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In The

Supreme Court of the United States

October Term, 1975

No. 75-1255

JAMES E. DOUGLAS, JR.,

Appellant,

v.

SEACOAST PRODUCTS, INC., THE NEW SMITH MEAL COMPANY, INC., AND SECOND OCEANIC CORPORATION,

Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

BRIEF FOR THE APPELLANT

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BRIEF FOR THE APPELLANT

OPINION BELOW

The final order and opinion of the three-judge District Court below are not yet reported. Copies of the final order and opinion are set forth in the Appendix filed with this brief at pages 14 and 16, respectively.

JURISDICTION

The final order and opinion of the three-judge District Court below were entered on November 7, 1975. Notice of Appeal was filed with the District Court below on January 5, 1976. The Jurisdictional Statement of the Appellant was

filed with this Court on March 5, 1976 and this Court noted probable jurisdiction on April 26, 1976. The jurisdiction of this Court rests on 28 U.S.C. § 1253.

QUESTIONS PRESENTED

1. Whether the Bartlett Act, 16 U.S.C. § 1081, or other federal enactments preempt state authority to regulate commercial fisheries within state inland waters and the three-mile marginal sea?

2. Whether a state law which prohibits foreign-owned corporations from invading commercial fisheries stocks in state inland waters and the three-mile marginal sea is violative of the Equal Protection Clause of the Fourteenth Amendment?

3. Whether a state law which prohibits non-residents from engaging in a commercial fishery within state inland waters is violative of the Equal Protection Clause of the Fourteenth Amendment?

4. Whether state laws limiting eligibility for licenses to take fish in state territorial waters on the basis of residency or citizenship interfere with or unduly burden interstate commerce?

5. Whether the lower court should have abstained from deciding upon the constitutionality of state laws regulating commercial fisheries where there is no infringement of sensitive constitutional guarantees and state court interpretation might resolve or avoid broad constitutional questions?

STATUTES INVOLVED

The statutory provisions directly involved are 16 U.S.C. § 1081 and Virginia Code §§ 28.1-60 and 28.1-81.1. These statutes are set out in full text in the Appendix, at page 114.

The provisions of the United States Constitution involved are the Supremacy Clause, Article VI, ¶ 2, the Equal Protection Clause, Amendment XIV, § 1, and the Commerce Clause, Article I, § 8, cl. 3.

STATEMENT

This case concerns the right of the Commonwealth of Virginia to protect its valuable but limited fisheries resources from depletion by foreign-owned and controlled commercial fishing corporations and its right to conserve its Chesapeake Bay menhaden fishery by excluding non-residents who are not susceptible to effective enforcement of existing conservation laws.

Section 28.1-81.1 of the Virginia Code limits the issuance of commercial fishing licenses for taking of all fin fish to United States citizens. In respect to corporations the same statute provides that no corporation shall be deemed a citizen of the United States unless at least seventy-five per centum of the interest therein is owned by United States citizens. The provisions of this statute, enacted by the Virginia General Assembly in 1975, apply to the taking of fin fish in all inland Virginia waters, including the Chesapeake Bay and the Virginia three-mile marginal sea.

By Section 28.1-60 of the Virginia Code the taking of menhaden in the Chesapeake Bay, one of Virginia's most valuable fisheries, is limited to Virginia resident persons, firms and corporations. Section 28.1-60(3), however, permits non-residents to take menhaden within the three-mile Virginia marginal sea.

The Appellee, Seacoast Products, Inc., ("Seacoast") is a Delaware corporation with principal offices in New Jersey. The New Smith Meal Company, Inc., a Massachusetts corporation, also has its main offices in New Jersey. Second

Oceanic Corporation is incorporated under New York law and has its principal offices in that state. The New Smith Meal Company, Inc., and Second Oceanic Corporation are both subsidiaries of Seacoast which is, in turn, controlled by Hanson Trust, Ltd. an English corporation wholly owned by alien stockholders.

Contrary to the misundertanding of the lower court, Seacoast has never been engaged in the menhaden fishery within the Chesapeake Bay, since its non-resident status rendered it ineligible for such licenses under § 28.1-60.[1]

Prior to the enactment of § 28.1-81.1 in 1975, Seacoast had licensed some four or five vessels yearly for the taking of menhaden in the Virginia three-mile marginal sea as permitted under § 28.1-60(3). (Dep. James E. Douglas, Jr., App., p. 43). But in terms of actual fishing effort Seacoast has, in recent years, engaged in little or no substantial activity in Virginia waters. (Stipulation, App., pp. 36-37). Upon application for 1975 non-resident menhaden licenses, permitting the taking of menhaden in the marginal sea, Seacoast was denied the same by the Appellant, James E. Douglas, Jr., on the basis of the newly enacted provisions of § 28.1-81.1.[2]

Seacoast thereafter filed, on July 14, 1975, its Complaint seeking temporary and permanent injunctive relief enjoining enforcement of both §§ 28.1-81.1 and 28.1-60 alleging that both statutes were unconstitutional. On November 7, 1975 the three-judge District Court entered its final order and rendered its opinion, finding both statutes invalid. The

[1] The District Court incorrectly states in its opinion that Seacoast had heretofore been granted licenses to take menhaden in the Chesapeake Bay. App., p. 18).

[2] Since Seacoast is controlled by Hanson Trust, Ltd., owned wholly by non-citizens of the United States, it was ineligible for licenses under § 28.1-81.1(b).

lower court found that § 28.1-81.1, limiting issuance of commercial fishing licenses to citizens of the United States, was preempted by the provisions of the Bartlett Act, 16 U.S.C. § 1081 *et seq.* It found § 28.1-60, barring non-residents from the Chesapeake Bay menhaden fishery, violative of the Equal Protection Clause of the Fourteenth Amendment. It is from this judgment that the instant appeal arises.

SUMMARY OF ARGUMENT

I. A. The Bartlett Act, 16 U.S.C. § 1081 *et seq.,* does not preempt state authority to regulate and license commercial fisheries in the three-mile marginal sea. The federal statute (16 U.S.C. § 1081) prohibits foreign flag vessels from fishing in the marginal sea, and therefore, cannot be viewed as preempting state regulations respecting United States flag vessels. *Huron Portland Cement Co.* v. *Detroit,* 362 U.S. 440 (1960), *Savage* v. *Jones,* 225 U.S. 501 (1912). The states are free to license fishing in the marginal sea within their respective boundaries and to regulate fisheries seasons, equipment, the manner of taking fish and amounts of fish taken, among other things, with respect to United States flag vessels. *Toomer* v. *Witsell,* 334 U.S. 385, (1948), *Skiriotes* v. *Florida,* 313 U.S. 69 (1941). Virginia Code § 28.1-81.1, denying commercial fishing licenses to foreign-owned corporations operating United States flag vessels in the inland waters and marginal sea of Virginia, is not, therefore, preempted by 16 U.S.C. § 1081.

B. The Bartlett Act, 16 U.S.C. § 1081 *et seq.,* does not preempt state authority even as to foreign flag vessels. While the federal law prohibits foreign flag vessels from fishing in the marginal sea generally, but authorizes the Secretary of the Treasury to permit foreign flag vessels as

deemed appropriate, the Secretary of the Treasury's authority to grant permission is conditioned upon concurrence of any affected state. Thus, the federal exercise of authority under 16 U.S.C. § 1081 was never intended to preempt state authority as to foreign flag vessels. *Florida Lime and Avocado Growers* v. *Paul,* 373 U.S. 132 (1963). The Appellee, Seacoast, is a foreign-owned corporation operating United States flag vessels, to which 16 U.S.C. § 1081 does not apply. Seacoast cannot, therefore, benefit from any preemption by 16 U.S.C. § 1081 even if 16 U.S.C. § 1081 did preempt state authority as to foreign flag vessels. But, as is noted above, 16 U.S.C. § 1081 does not preempt state laws respecting foreign flag vessels, requiring state concurrence in any federal permission to fish in marginal seas. Virginia Code § 28.1-81.1 denies licenses to any corporation that is foreign-owned, whether it uses foreign flag vessels or United States flag vessels. Since 16 U.S.C. § 1081 applies only to foreign flag vessels, it cannot be construed as preempting state regulation of United States flag vessels. *Huron Portland Cement Co.* v. *Detroit,* 362 U.S. 440 (1960). Accordingly, Virginia Code § 28.1-81.1, which denies foreign-owned corporations licenses to take fish in Virginia waters, is not superseded by 16 U.S.C. § 1081 in any respect.

C. The federal statutes under which vessels are enrolled and licensed for the coasting trade and fisheries (46 U.S.C. §§ 251, 259, 260, 263) do not preempt the authority of the states to license vessels for the taking of fish within state territorial waters. The federal enrollment statutes do not confer affirmatively the right to fish in every state's waters irrespective of state licensing requirements or other state fisheries regulations. *Manchester* v. *Massachusetts,* 139 U.S. 240 (1891), *Smith* v. *Maryland,* 18 How. 71 (1855).

Since the federal vessel enrollment and licensing statutes were enacted on the basis of the power of Congress to regulate commerce, *Wiggins Ferry Co.* v. *City of East St. Louis,* 107 U.S. 365 (1882), and since the taking of fish and regulation of fisheries within the state is a local matter not a part of commerce, *Toomer* v. *Witsell,* 334 U.S. 385 (1948), *Manchester* v. *Massachusetts,* 139 U.S. 240 (1891), the federal statutes were never intended to confer affirmatively the right to take fish from state waters to the exclusion of state laws to the contrary. The "license" issued to vessels enrolled for the coasting trade and fisheries under federal statutes is for the purpose of identifying the intended use of U.S. flag vessels. Federal vessel inspection laws vary according to vessel use. The approval of the Secretary of Commerce, under 46 U.S.C. § 808, 835, authorizing the sale or transfer of vessels already enrolled and licensed to foreign-owned corporations does not supersede state laws which, like Virginia Code § 28.1-81.1, deny licenses to foreign-owned corporations. The only effect of approval under 46 U.S.C. § 808, 835 is to allow U.S. enrolled vessels to be transferred to foreign-owned corporations. Virginia Code §§ 28.1-81.1 and 28.1-60, which limit licenses for taking of fish in Virginia to citizens and residents, are not, therefore, preempted by federal enrollment and licensing laws (46 U.S.C. § 251, 259, 260, 263) or the statutes regulating transfer of U.S. enrolled and licensed vessels to foreign-owned corporations (46 U.S.C. § 808, 835).

II. Virginia Code § 28.1-81.1, which denies foreign-owned corporations such as Seacoast licenses to take fish in state waters, is a valid exercise of state police powers to conserve fisheries resources against depradations by foreign fishing interests and is permissible under the Fourteenth Amendment. Because the portion of the statute in question

here does not apply to *individual resident aliens,* who may be entitled to certain presumptions emanating from the immigration and naturalization process, but instead applies so as to deny licenses to *foreign-owned corporations,* who are neither *citizens* nor *individual resident aliens,* the "close judicial scrutiny" and "compelling interest" tests applied in *Sugarman* v. *Dougall,* 413 U.S. 634 (1973), In re *Griffiths,* 413 U.S. 717 (1973), and *Graham* v. *Richardson,* 403 U.S. 365 (1971) are not applicable. Under traditional equal protection standards, Virginia Code § 28.1-81.1 is supported by a reasonable basis in fact which justifies its exclusion of foreign-owned corporations from the taking of fish in Virginia waters. Foreign fishing interests do not have the self-interest in fisheries conservation which characterizes United States fishermen. They are not dependent, as United States fishermen, on a continuous resource. Virginia's experience with destruction of its river herring fishery by foreign fleets is a prime example. The predatory practices of foreign fishing interests and the resulting stock depletions are documented in Congressional findings in hearings on the new two-hundred mile fishery zone, Public Law, No. 94-265. Foreign fishing interests, faced with the extension of the U.S. fishery zone from twelve to two-hundred miles offshore, will be likely to seek means to avoid the restrictions of the new law. This may be accomplished by foreign interests who establish shell corporate entities in the United States and purchase American built vessels, thereby becoming eligible to enroll their vessels under federal enrollment and licensing statutes. 46 U.S.C. §§ 251, 252, 11. Federal enrollment of their vessels will entitle foreign shell corporations to fish, without the same regulation applicable to foreign flag vessels, inside the two-hundred mile limit up to the three-mile line. Corporate domicile of the shell corporations in any of the states, irrespective of the citizenship of the stockholders, will enable such foreign interests to fish that state's waters of the three-mile marginal sea as well as the remainder of its inland waters. It is this danger which Virginia Code § 28.1-81.1 seeks to avoid by requiring that corporate licensees be at least seventy-five per cent owned and controlled by United States citizens. Virginia Code § 28.1-81.1 is, therefore, supported by a reasonable basis in fact and is a permissible exercise of state police power to conserve fisheries, consistent with the Equal Protection Clause of the Fourteenth Amendment. *McGowan* v. *Maryland,* 366 U.S. 420 (1961), *Dandridge* v. *Williams,* 397 U.S. 471 (1970). Further, the proprietary interest of the states in their commercial fisheries is sufficient to justify exclusion of foreign corporations. *Patsone* v. *Pennsylvania,* 232 U.S. 138 (1914), *Truax* v. *Raich,* 239 U.S. 33 (1915). The Submerged Lands Act, 43 U.S.C. § 1301 *et seq.,* gives clear title to the states in all fisheries resources of the marginal sea and inland waters, thereby making inapposite the holding in *Takahashi* v. *Fish Comm'n.,* 334 U.S. 410 (1948).

III. Virginia Code § 28.1-60, limiting licenses for the Chesapeake Bay menhaden fishery to Virginia resident persons and corporations, is a valid exercise of state police power to conserve fisheries. The statute classifies on the basis of *residency* and is, therefore, tested under traditional equal protection standards, requiring a reasonable basis or justification of the statute. *McGowan* v. *Maryland,* 366 U.S. 420 (1961). The Chesapeake Bay, an inland body of water, is populated by nursery and young menhaden fish. This particularly fragile resource requires effective enforcement of Virginia's statutes regulating the taking of menhaden in the Bay, particularly Code § 28.1-65, limiting net

mesh size. Enforcement of the statute regulating net mesh size is virtually impossible as to non-resident fishermen since they do not land catches at Virginia ports. Dockside enforcement of the net regulations is the only effective method of enforcement. Virginia residents, moreover, have a greater self-interest in preservation of the Bay menhaden fishery. Non-residents, therefore, constitute the particular source of evil and may, therefore be excluded consistent with the Equal Protection Clause of the Fourteenth Amendment. *Toomer* v. *Witsell,* 334 U.S. 385 (1948). Virginia Code § 28.1-60, limiting Bay menhaden licenses to residents, is, therefore, justified by a reasonable basis in fact and is a permissible exercise of police power in conserving fisheries. *McGowan* v. *Maryland,* 366 U.S. 420 (1961). In addition the proprietary interest of the state, alone, is sufficient to support Virginia's exclusion of non-residents from taking fish from its inland waters. *McCready* v. *Virginia,* 94 U.S. 391 (1877).

IV. Virginia Code §§ 28.1-60 and 28.1-81.1 limit licensing for the "taking of fish" within the territorial waters of Virginia. The "taking of fish" is not a part of commerce among the states, *Toomer* v. *Witsell,* 334 U.S. 385 (1948), nor is the regulation of fisheries a regulation of commerce. *Manchester* v. *Massachusetts,* 139 U.S. 240 (1891). Nor do the statutes in any manner burden or interfere with the flow of commerce. Neither statute regulates or impedes navigation. Since neither statute restricts the flow of fish in commerce into or out of the state after being taken, they impose no burden upon interstate commerce. *Bayside Fish Flour Co.* v. *Gentry,* 297 U.S. 422 (1936).

V. The Court below should have abstained to avoid interference in state administration of its domestic policies and programs relative to fisheries, traditionally recognized as a

local matter. *Alabama Public Service Commission* v. *Southern Rwy. Co.,* 341 U.S. 341 (1951), *Burford* v. *Sun Oil Co.,* 319 U.S. 315 (1943), *Great Lakes Dredge Co.* v. *Huffman,* 319 U.S. 293 (1943). Since the application of § 28.1-81.1, denying license to persons, partnerships and corporations which are not citizens of the United States, to individual resident aliens is not necessary to a decision in this case, and since the Virginia Court might interpret § 28.1-81.1 as applying its denial of licenses only to non-resident alien individuals and all foreign-owned corporations, this Court should not decide the broad constitutional issue of the constitutionality of § 28.1-81.1 as applied individual resident aliens. Should the Court view § 28.1-81.1 as raising issues relating to individuals, the case should be remanded on this point to allow state court interpretation which might avoid the constitutional issue.

ARGUMENT

I.

Federal Statutes Have Not Preempted State Authority To Regulate Commercial Fisheries Within Inland Waters Of The States Or The Three-Mile Marginal Sea

A. The Bartlett Act, 16 U.S.C. § 1081, Has Not Preempted State Authority To Regulate Commercial Fisheries In The Three-Mile Marginal Sea

This Court has repeatedly confirmed the authority of the states to regulate commercial fisheries within their boundaries in the three-mile marginal sea. *Toomer* v. *Witsell,* 334 U.S. 385 (1948), *Skiriotes* v. *Florida,* 313 U.S. 69 (1941), *Manchester* v. *Massachusetts,* 139 U.S. 240 (1891). This authority in the states is limited only by the power exercised by Congress in the regulation of commerce, both foreign

and domestic. In *Manchester* v. *Massachusetts, supra,* it was held:

> "[T]he right to the fisheries and the power to regulate the fisheries on the coasts and in the tide-waters of the State were left, by the Constitution of the United States, with the States, subject only to such powers as Congress may justly exercise in the regulation of commerce, foreign and domestic." 139 U.S. 240, 258.

Applying these familiar principles, however, the District Court held as to Virginia Code § 28.1-81.1 as follows:

> "In our judgment this legislation (Act of Congress approved May 20, 1964, 78 Stat. 194, 16 U.S.C. § 1081, *et seq.*) preempted Virginia's control of commercial sea fisheries and superseded the States' regulation of them." (App., p. 20).

The federal enactment which the District Court found preemptive of *all* state regulation of marginal sea fisheries, 16 U.S.C. § 1081, has the very narrow purpose of prohibiting foreign flag vessels (vessels not enrolled under United States enrollment statutes, 46 U.S.C. § 251, *et seq.*) from fishing in the three-mile marginal seas bordering the United States. (See full text of 16 U.S.C. § 1081, App., p. 118). Under the holding of the District Court, however, 16 U.S.C. § 1081 deprives the states of all power to regulate and conserve marginal sea fisheries. Virginia and every other coastal state would, under this interpretation, be powerless to limit fishing seasons, fishing equipment, catch size and a myriad of other factors highly relevant to conservation of fisheries in the marginal sea. In so holding, the lower court runs afoul of the most basic principles of preemption laid down by this Court in *Skiriotes* v. *Florida,* 313 U.S. 69 (1941), *Kelley* v. *Washington,* 302 U.S. 1 (1937), *Mintz*

v. *Baldwin,* 289 U.S. 346 (1933), *Savage* v. *Jones,* 225 U.S. 501 (1912) and *Reid* v. *Colorado,* 187 U.S. 137 (1902). In *Skiriotes, supra,* it was said:

> "Congress having occupied but a limited field, the authority of the state to protect its interests by additional or supplementary legislation otherwise valid is not impaired." 313 U.S. 69, 75

In short, the enactment of 16 U.S.C. § 1081, which regulates the limited matter of fishing by foreign flag vessels in the marginal sea, cannot be reasonably interpreted as preemptive of all state authority in the regulation of commercial fisheries of the three-mile marginal sea.

B. The Bartlett Act, 16 U.S.C. § 1081, Has Not Preempted Or Superseded Virginia Code § 28.1-81.1

Virginia Code § 28.1-81.1 denies foreign-controlled corporations commercial fishing licenses for use in Virginia waters, including the three-mile marginal sea. Within the class of foreign-owned corporations denied licenses under § 28.1-81.1 are those, like Seacoast, which are foreign-owned but which have acquired United States flag vessels (vessels enrolled under United States enrollment statutes, 46 U.S.C. § 251, *et seq.*) Also within this class of foreign-owned corporations are those which operate foreign flag vessels. The Bartlett Act, 16 U.S.C. § 1081, on its face applies only to foreign flag vessels. It cannot, therefore, be viewed as preempting the operation of Virginia Code § 28.1-81.1 in respect to United States flag vessels operated by foreign-owned corporations. *Savage* v. *Jones,* 225 U.S. 501 (1912); *Reid* v. *Colorado,* 187 U.S. 137 (1902). Seacoast is a foreign-owned corporation operating United States flag vessels. Since the provisions of 16 U.S.C. § 1081 could,

at most, preempt state laws regulating fishing by foreign flag vessels, Seacoast, operating United States flag vessels, cannot possibly claim the benefit of any preemptive effect of 16 U.S.C. § 1081.

Moreover, facial examination of 16 U.S.C. § 1081 and reference to its legislative history make it amply clear that the federal legislation is devoid of any preemptory purpose or effect. Even within the confines of its narrow operation, regulating as it does only foreign flag vessels, 16 U.S.C. § 1081 cannot be said to preempt Virginia Code § 28.1-81.1 as it applies to foreign-owned corporations operating foreign flag vessels. It is true that 16 U.S.C. § 1081 provides that the Secretary of the Treasury may, upon concurrence of other federal officials, permit foreign flag vessels to fish in the three-mile marginal sea. If the federal statute placed unqualified authority in the Secretary to permit such foreign flag vessels to fish it might be argued successfully that 16 U.S.C. § 1081 conflicts with and supersedes any state law prohibiting such foreign flag vessels from fishing. But the authority of the Secretary of the Treasury is conditioned upon the "concurrence of any State, Commonwealth, territory or possession directly affected." The federal statute, containing the above quoted provision requiring state concurrence in any permit authorizing fishing by foreign flag vessels, cannot, therefore be interpreted as preemptive of Virginia's authority to deny licenses to such foreign flag vessels. *Florida Lime and Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132 (1963). Put simply, preemption is not to be inferred, but is implied only when the act of Congress, fairly interpreted, is in actual conflict with the law of a state. *Huron Portland Cement Co.* v. *City of Detroit,* 362 U.S. 440, 443 (1960). Far from evidencing any conflict, the federal enactment in question avoids any possible conflict with state laws or interests by requiring state concurrence in any fed-

eral permit authorizing foreign flag vessels to fish in the marginal seas of the state. It can hardly be contended, therefore, that 16 U.S.C. § 1081 was intended to preempt state authority to deny fishing rights to foreign flag vessels within their territorial waters.

While the language of 16 U.S.C. § 1081 itself resolves any question of preemption, further confirmation that preemption was never intended is abundantly evident in the reports of the Senate and House Committees which considered the legislation. The Report of the House Merchant Marine and Fisheries Committee, H.R. Rep. No. 1356, 88th Cong., 2nd Sess., states:

> "It was brought out at the hearings that the powers of the States in dealing with trespassers of their territorial waters would not be preempted by the passage of this bill and for those states already having sanctions, this bill would only supplement existing case law." [2 U.S. Cong. & Admin. News 1964 at 2183.]

Similar was the view of the Senate Commerce Committee. Senate Report No. 500, accompanying S. 1988, 88th Cong., 1st Sess., notes:

> "This bill will not preempt the states of their powers against trespassers of their territorial seas."

As is noted above, however, even if 16 U.S.C. § 1081 were viewed as preempting state laws, it would only preempt state laws respecting foreign flag vessels, since that is the subject matter with which 16 U.S.C. § 1081 deals. Seacoast, a foreign-owned corporation operating United States flag vessels, cannot, therefore benefit by any such federal preemption.

Seacoast, however, contends in its Motion to Affirm that 16 U.S.C. § 1081 must be read not only as a statute which

limits fishing by foreign flag vessels, but as a measure which affirmatively confers rights on all United States vessels to take fish from the waters of the marginal sea. These affirmative rights allegedly conferred upon all United States flag vessels cannot, Seacoast contends, be negated by state licensing laws such as Virginia Code § 28.1-81.1. To ascribe such a purpose to 16 U.S.C. § 1081 is to ignore the language of the statute itself, which deals entirely with regulation of foreign flag vessels. The only reference to United States vessels is included for the obvious purpose of indicating that the provisions of the statute have no application to United States vessels:

> "It is unlawful for any vessel, except a vessel of the United States, or for any master or other person in charge of such a vessel, to engage in the fisheries within the territorial waters of the United States. . ."

Moreover, if the language of the statute itself is not sufficiently clear as to the purpose of the legislation, the above-quoted portions of the House and Senate Committee reports confirm that the sole purpose of 16 U.S.C. § 1081 is to limit fishing by foreign flag vessels, consistent with State laws and interests. There is not a shred of evidence that 16 U.S.C. § 1081 was intended to grant to all United States vessels rights to take fish from territorial waters of the states, notwithstanding state laws which might limit entry into its fisheries of the marginal sea.

C. Federal Statutes Providing For Enrollment And Licensing Of Fishing Vessels Do Not Preempt Or Supersede Virginia Code Sections 28.1-60 And 28.1-81.1

In its Motion to Affirm Seacoast advances the argument that federal enrollment laws, specifically 46 U.S.C. §§ 251, 259, 260, 263, under which vessels are enrolled and licensed

for use in the coasting trade and fisheries, preempt and supersede state law such as those in question here. The contention is that federal enrollment and licensing under 46 U.S.C. § 251 *et seq.* confers upon the owners of the vessels an affirmative right to take fish from the marginal sea or inland waters of every state and that such federal rights cannot be negated by state laws to the contrary. This theory was long ago rejected by this Court in *Manchester* v. *Massachusetts,* 139 U.S. 240 (1891). There a Rhode Island citizen, operating a fishing vessel enrolled and licensed under the same federal statute as that relied upon by Seacoast, was convicted of violating a Massachusetts law regulating the type of seines and nets used for taking menhaden in Massachusetts' Buzzard's Bay. In responding to the several contentions of the appellant, among which it was argued that the federal license and enrollment statute conferred a right to fish which could not be negated or limited by state law, the Court held:

> "The principal contentions in this Court on the part of the defendant are that, although Massachusetts, if an independent nation, could have enacted a statute like the one in question . . . yet when she became one of the United States, she surrendered to the federal government her right of control over fisheries of the ocean . . . that fishing upon the high seas is in its nature an integral part of national commerce, and its control and regulation are necessarily vested in Congress and not in the individual States; that Congress has manifested its purpose to take the regulation of coast fisheries . . . by . . . granting the license under which the defendant's steamer was fishing; *and, that, in view of the act of Congress authorizing such license, no statute of a State could defeat the right of the defendant to fish in the high seas under it. . .*
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> * * *

> In *Dunham* v. *Lamphere,* 3 Gray 268, it was held . . . that in the distribution of powers between the federal and State governments, *the right to the fisheries and the power to regulate the fisheries on the coasts and in the tide-waters of the State, were left, by the Constitution of the United States, with the states, subject only to such powers as Congress may justly exercise in the regulation of commerce, foreign and domestic."* 139 U.S. 240, 254, 255, 258.

The Court then recited with approval the lower court holding that:

> "It had never been decided anywhere that the regulation of the fisheries within the territorial limits of a State was a regulation of commerce." 139 U.S. 240, 259.

And addressing the effect of federal enrollment and licensing the Court said:

> "In *Smith* v. *Maryland,* 18 How. 71, 74, a vessel licensed to be employed in the coasting trade and fisheries, was seized by the sheriff of Anne Arundel County in Maryland, while engaged in dredging for oysters in Chesapeake Bay, in violation of a statute Maryland enacted.
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> The Court . . . held that the act [of Maryland] was not repugnant to the clause of the Constitution which conferred upon Congress the power to regulate commerce, and that *the enrollment and license of the vessel gave to the plaintiff in error no right to violate the statute of Maryland."* 139 U.S. 240, 260, 261

Manchester v. *Massachusetts, supra,* and *Smith* v. *Maryland, supra,* both hold, therefore, that federal enrollment and licensing of fishing vessels does not confer affirmatively

a right to take fish in state territorial waters which right cannot be limited or negated by state fisheries laws. One who operates an enrolled and licensed fishing vessel in state territorial waters is subject to all state laws regulating the taking of fish therein, including laws respecting licensing. Those ineligible for state licenses under a state law otherwise valid cannot, therefore, rely upon the federal enrollment and licensing as authorizing the taking of fish in contravention of the state law's prohibition. *Smith* v. *Maryland, supra; Manchester* v. *Massachusetts, supra.*

Examination of the constitutional basis of the federal enrollment laws confirms the correctness of the above-discussed holdings of this Court that federal enrollment and licensing confers no affirmative right to take fish from the waters of the states. The authority under which the federal enrollment and licensing statutes were enacted is the power of Congress to regulate commerce. *Wiggins Ferry Co.* v. *City of East St. Louis,* 107 U.S. 365 (1882). The power of the Congress over commerce, however, does not extend to the regulation of the taking of fish. *Manchester* v. *Massachusetts,* 139 U.S. 240 (1891), *Toomer* v. *Witsell,* 334 U.S. 385 (1948). It, therefore, follows logically that the enrollment and licensing statutes, based entirely upon the power of Congress over commerce, cannot confer any right relating to the taking of fish in state territorial waters.

The fact that federal enrollment of a fishing vessel results in the issuance of a "license" is of little moment. Seacoast urges that issuance of a "license" to a vessel to be used in fisheries constitutes an affirmative grant of the right to participate in any state's fisheries which cannot be negated by contrary state law. The form of this "license," however, as set forth in 46 U.S.C. § 263, and the uses made of the license belie the Appellees' theory that rights to fish

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in state waters are thereby conferred. For example, it is evident that one purpose of the license is to *identify* the intended *use* of the vessel for purposes of federal inspection laws. Vessels are subject to differing inspection laws according to the intended vessel use. This explains the requirement of 46 U.S.C. § 263 that the license indicating use be renewed yearly, while the enrollment certificate is permanent. Fisheries vessels are, in fact, free of federal inspection requirements. 46 U.S.C. § 404. On the other hand, passenger carrying vessels, vessels carrying inflammable liquid cargoes, and sea going barges, are each subject to individually tailored inspection requirements. See 46 U.S.C. §§ 390a, 391a, and 395. Accordingly, federal vessel enrollment and licensing does not amount to an affirmative grant of the right to take fish from Virginia territorial waters, inland or in the marginal sea, in violation of the entry requirements of Virginia laws.

Seacoast's reliance in *Harman* v. *City of Chicago,* 147 U.S. 396 (1893), is, as well, misplaced. In that instance a local law taxed the *navigation* of vessels on the Chicago River. It has always been recognized, since *Gibbons* v. *Ogden,* 9 Wheat. 1 (1824), that state laws interfering with *navigation* constituted unlawful impediments to the unrestricted flow of commerce, over which the Congress has paramount and exclusive authority. *Harman* does not, therefore, stand for the proposition, broadly asserted by the Appellees, that no federal license can be negated by state law. *Harman* merely reaffirms *Gibbons'* holding that a federal license authorizing activities that are a part of *commerce* cannot be overriden or impeded by state laws. But commerce and the power of Congress over it has never been construed to extend to the taking of fish in state waters. *Toomer* v. *Witsell,* 334 U.S. 385 (1948); *Manchester* v.

Massachusetts, 139 U.S. 240 (1891). *Harman,* therefore, is of no import in the circumstances of this case. The Virginia statutes in question limit their effect and operation to the taking of fish and in no way regulate navigation or any activity which could be viewed as commerce.

This Court carefully but forcefully limited the holding of *Harman* v. *Chicago, supra,* and similar cases, in *Huron Portland Cement Co.* v. *Detroit,* 362 U.S. 440 (1960). In *Huron* this Court upheld the City of Detroit's Smoke Abatement Code as applied to vessels licensed and enrolled under federal statutes and operating in interstate commerce. In rejecting the identical argument made by Seacoast here the Court held:

> "An additional argument is advanced, however, based not upon the mere existence of the federal inspection standards, but upon the fact that the appellant's vessels were actually licensed, 46 U.S.C. § 263, and enrolled, 46 U.S.C. §§ 259-260, by the national government. It is asserted that the vessels have thus been given a dominant federal right to the use of the navigable waters of the United States, free from the local impediment that would be imposed by the Detroit ordinance.
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> *The mere possession of a federal license, however, does not immunize a ship from the operation of the normal incidents of local police power, not constituting a direct regulation of commerce."* 362 U.S. 440, 446, 447.

Unless, therefore, a state or local law directly burdens *commerce,* such law is not superseded by the federal enrollment and licensing of a vessel. As was noted previously, the two Virginia laws in question make no attempt to regulate navigation or any incident of commerce. Their sole effect is the

regulation and limitation of the activity of taking fish in state territorial waters, which has never been viewed by this Court as a part of commerce. *Toomer* v. *Witsell,* 334 U.S. 385 (1948). *Huron* thoroughly reviews the legal effect of federal vessel licensing and enrollment as it relates to state laws regulating matters of local concern. The holding of *Huron,* consistent with this Court's previous holdings regarding this issue, effectively and completely disposes of Seacoast's preemption contentions founded upon its status as a federal vessel licensee. Virginia's statutes under review here represent valid state regulation of a purely local matter within the police powers of the state, and as such, are not preempted or superseded by the operation of federal licensing and enrollment statutes.

One final assertion of federal statutory preemption urged by Seacoast can be disposed of without difficulty. It is contended by the Appellees that approval of the transfer or sale of United States licensed and enrolled vessels to Seacoast, a foreign-owned corporation, as required by 46 U.S.C. §§ 808, 835, effectively confers on Seacoast authority to take fish in the waters of every state, state laws to the contrary notwithstanding. This argument reveals the Appellees' complete misunderstanding of the federal statutes regulating enrollment and licensing. The federal statutes relied upon by Seacoast, 46 U.S.C. §§ 808, 835 provide that no vessel already enrolled and licensed under federal statutes (46 U.S.C. §§ 251, 259, 260, 263) may be transferred by any means to corporations controlled by foreign interests unless approved by the Secretary of Commerce. The sum effect of the approval of the Secretary of Commerce, under 46 U.S.C. §§ 808, 835 is federal approval of the transfer of U.S. enrolled vessels to foreign ownership. The transfer of United States enrolled vessels to Seacoast, under 46 U.S.C. §§ 808, 835 cannot be viewed as vesting Seacoast

with any rights to take fish in contravention of Virginia statutes to the contrary.

II.

Virginia Code Section 28.1-81.1 Which Denies Foreign-Owned Corporations Commercial Fishing Licenses Is A Valid Exercise Of State Police Power To Conserve Fisheries And Is Permissible Under The Fourteenth Amendment

Virginia Code § 28.1-81.1 denies commercial fishing licenses to any person, partnership or corporation not a citizen of the United States. The same statute defines corporate citizenship thereunder and applies its denial of licenses to corporations the interest in which is more than twenty-five per cent foreign-owned.

The Appellee, Seacoast, was denied licenses on the basis of the provisions of § 28.1-81.1 which make ineligible foreign-owned corporations. Thus, Seacoast is denied licenses because its controlling interests were owned by Hanson Trust Ltd., a British corporation owned wholly by citizens of the United Kingdom. The Appellees denied licenses here are neither "citizens," *Orient Insurance Company* v. *Daggs,* 172 U.S. 557 (1869), nor are they individual resident aliens. ***The question presented by this appeal, therefore, is not whether any alien may be denied a license but whether foreign-owned corporations may legitimately be denied these licenses.***

The decisions of this Court in *Sugarman* v. *Dougall,* 413 U.S. 634 (1973), *In re Griffiths,* 413 U.S. 717 (1973) and *Graham* v. *Richardson,* 403 U.S. 365 (1971) are inapposite to the problems raised in this appeal. In each of the aforementioned cases this Court addressed the issue of the validity of state laws excluding *individual resident aliens* from rights or privileges afforded United States citizens. Only in the context of discrimination against *individual resident*

aliens has the majority of this Court applied a "compelling state interest" standard of review under the Fourteenth Amendment. See *Sugarman, supra; In re Griffiths, supra; Graham, supra.* That higher standard of review is not demanded here, where the Appellees are foreign-owned corporate entities. Instead, traditional principles of equal protection applicable to state laws regulating economic and business activities may be applied to this appeal. Under traditional standards a state law regulating economic and business activities is adjudged valid against the Equal Protection Clause if it has *some reasonable basis, Dandridge* v. *Williams,* 397 U.S. 471, 485 (1970), or *some reasonable set of facts may be conceived to justify it. McGowan* v. *Maryland,* 366 U.S. 420, 426 (1961).

There is ample justification for reviewing this case under traditional equal protection standards. It is the individual resident alien who, under the Constitution, resembles the citizen. *In re Griffiths,* 413 U.S. 717, 722 (1973). The protections and presumptions which may logically emanate from federal imigration and naturalization processes do not have application or afford rationale for extending similar protection to foreign-owned corporate entities. The rationale which may have force in equating individual resident aliens with United States citizens so as to require close judicial scrutiny of a classification based on alienage does not apply in this case.

Applying traditional equal protection standards the Virginia statute in question must be upheld as a valid exercise of the state police power in conserving valuable but limited fisheries resources. Experience in fisheries management has revealed that native fishermen have a significantly greater self-interest in conservation of fisheries stocks. The characteristic fishing practice of foreign fishing interests has been over-fishing and rapid depletion of stocks, after which the

foreign interests depart for other more abundant stocks. Over-fishing in one year by foreign fishing interests does not imperil next season's potential harvest or income as it will with native fisherman. These facts have been thoroughly documented in hearings before Congressional committees considering the federal legislation extending the United States fishery zone. The findings of those hearings preface the newly enacted United States two-hundred mile fisheries limit, Public Law 94-265.[3]

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[3] (a) Findings—The Congress finds and declares the following:

(1) The fish off the coasts of the United States constitutes valuable and renewable natural resources.

(2) As a consequence of increased fishing pressure and because of the inadequacy of fishery conservation and management practices and controls (A) certain stocks of such fish have been overfished to the point where their survival is threatened, and (B) other such stocks have been so substantially reduced in number that they could become similarly threatened.

(3) Commercial and recreational fishing constitutes a major source of employment and contributes significantly to the economy of the Nation. Many coastal areas are dependent upon fishing and related activities, and their economies have been badly damaged by the over-fishing of fishery resources at an ever-increasing rate over the past decade. The activities of massive foreign fishing fleets in waters adjacent to such coastal areas have contributed to such damage, interfered with domestic fishing efforts, and caused destruction of the fishing gear of United States fishermen.

(4) International fishery agreements have not been effective in preventing or terminating the over-fishing of these valuable fisheries resources. There is danger that irreversible effects from over-fishing will take place before an effective international agreement on fishery management jurisdiction can be negotiated, signed, ratified, and implemented.

(5) Fishery resources are finite but renewable. If placed under sound management before over-fishing has caused irreversible effects, the fisheries can be conserved and maintained so as to provide optimum yields on a continuing basis.

Publ. L. No. 94-265, 90 Stat. 331, § 2(a).

The Virginia Statute was not, however, a response to the general experience of the nation only. Virginia commercial fisheries have experienced directly the economic effects of foreign fishing tactics. The river herring industry, stable and productive in Virginia for over one-hundred years, was economically destroyed in a period of a few short years as a result of foreign off-shore activities. In the late 1960's Virginia began to experience rapid depletions of river herring after foreign fleets began fishing off our coasts in 1966. Federal agreements and enforcement efforts were ineffective in curbing the rapid decline of the stocks even after state fisheries experts and industry representatives reflected the drastic effects of the foreign effort. This fact highlights the need for voluntary compliance based on self-interest. Today there is no economically viable river herring fishery in Virginia. The effect of foreign effort has, therefore, been very pointedly demonstrated to Virginia fisheries management officials and the commercial fishing industry as well. Agreements, regulations, laws and enforcement techniques aimed at conservation notwithstanding, foreign fishing practices are devastating in their effect. In short, voluntary compliance and self-interest in preservation of the resource is absolutely essential to maintenance of the fragile balance between economic benefits derived from fisheries resources and preservation of the resource itself.

Statistics compiled by the Department of Commerce, National Marine Fisheries Service, further underline the results of foreign effort in American coastal fisheries. (See Dep. James E. Douglas, Jr., App., pp. 46-47). The direct relationship in time between commencement of foreign fleet effort against a particular fishery and the rapid American catch declines cannot be viewed as conicidental. (Dep. James E. Douglas, Jr., App., pp. 48-49). Nor can the catch

statistics be ignored as insignificant, the declines in some species amounting to as much as eighty-five percent over a ten year period. (Dep. James E. Douglas, Jr., App., pp. 46-47).

Given the documented depradations of fishery stocks by foreign fishing interests, what possible danger can they present to Virginia and other states which would justify passage of statutes like Virginia Code § 28.1-81.1? Seacoast hastens to note in its Motion to Affirm that federal law, namely 16 U.S.C. § 1081, already prohibits foreign flag vessels from entering state territorial waters of the three-mile marginal sea. Foreign flag vessels, it is urged, are allowed to fish within the next nine miles from the American coast only at the sufferance of the federal government, and then under whatever regulations the government deems necessary. Thus, Seacoast argues, the states need no further protection by laws such as the Virginia law in question here. Such short-sighted views, however, will not bear scrutiny.

First, until Congress enacted the recent legislation extending the United States fishery zone from twelve to two-hundred miles, foreign flag vessels could fish in waters off the American coast, outside of twelve miles, with complete impunity and free of regulation. Now foreign fleets face a two-hundred mile zone, the first three miles of which they cannot enter, and one-hundred ninety-seven miles in which they can fish only with United States consent and subject to federal regulation. The motivation to avoid the loss of unregulated access to such a vast coastal area will undoubtedly be intense. To avoid the new regulation foreign fisheries companies will be likely to seek ways to operate United States flag vessels, thereby gaining access to unrestricted fishing between three-miles and two-hundred miles, which

is denied foreign flag vessels. If foreign companies can enroll and license vessels under United States law, and meet, as well, state license requirements, they can have access to all American fisheries, including the three-mile state marginal seas and state inland waters. To meet present federal enrollment requirements all that is required is that the vessel to be enrolled be (1) American built and (2) owned by a corporate entity domiciled in any of the United States. 46 U.S.C. §§ 251, 252, 11. (The requirement of 46 U.S.C. § 11 that vessels to be enrolled be owned "wholly" by U.S. citizens, as applied to corporation-owned vessels, requires in the present view of the United States Coast Guard, that the corporation be domiciled in any of the United States.) Enrollment takes no account of the nationality or citizenship of the vessel-owning corporation's owners who, of course, determine corporate policy and fishing practices. Thus, a foreign controlled corporation need only establish a shell corporate structure in any state and purchase American-built vessels in order to enroll them as United States vessels eligible to fish on equal footing with United States fishing interests in the zone between three and two hundred miles. Furthermore, to be eligible for state fisheries in the three-mile marginal sea and state inland waters even the most stringent state licensing statutes require only that corporate licensees be domiciled in the state. This was the situation in Virginia before passage of § 28.1-81.1. Accordingly, a foreign-owned shell corporation with American-built vessels could readily gain entry to the fishery of the state in which it was located or domiciled and the entire United States zone between three and two-hundred miles, free of regulation applicable to foreign flag vessels. Yet such a foreign-controlled shell corporation might practice depradations equal to those of any foreign flag fishing interest.

It is this very danger which Virginia Code § 28.1-81.1 envisions and seeks to prevent by denying licenses to foreign-controlled corporations on the basis of the citizenship of the owners of the corporation, irrespective of the domicile of some corporate shell.

It is widely recognized among those experienced in fisheries management that fisheries conservation regulations cannot be effective without voluntary compliance founded upon self-interest in preservation of stocks. (Dep. James E. Douglas, Jr., App., p. 69). The Congress recognized this fact in its findings supporting extension of the United States fisheries zone, noting that conservation measures in international fisheries agreements had been ineffective in conserving stocks against determined foreign over-fishing practices. infra., pp. 25-26. It cannot, with these facts in mind, be gainsaid that Virginia's enactment of § 28.1-81.1 is without reasonable relation to the clearly permissible purpose of fisheries preservation. Accordingly, § 28.1-81.1 must be viewed as a valid exercise of state police powers permissible under the Equal Protection Clause of the Fourteenth Amendment. *McGowan* v. *Maryland,* 366 U.S. 420 (1961), *Dandridge* v. *Williams,* 397 U.S. 365 (1970).

There is, however, further reason for this Court to uphold the validity of the challenged statute. This Court has in many cases validated state laws which treated citizens and aliens, even resident aliens, differently. With respect to ownership of real property, *Terrace* v. *Thompson,* 263 U.S. 197 (1923), *Porterfield* v. *Webb,* 263 U.S. 225 (1923), the devolution of real property, *Blythe* v. *Hinckley,* 180 U.S. 333 (1901), *Hauenstein* v. *Lynham,* 100 U.S. 483 (1880), and preservation of wild game, *Patsone* v. *Pennsylvania,* 232 U.S. 138 (1914), this Court has recognized sufficient proprietary interests vested in the states to justify,

without further rationale, distinctions based on alienage. *Patsone* v. *Pennsylvania,* 232 U.S. 138 (1914) provides adequate precedent for upholding state laws like § 28.1-81.1, reserving fisheries or game resources of a state to United States citizens. In these cases this Court recognized the right of the states to determine that property held in trust for the citizens of the state could be reserved for use by U.S. citizens exclusively.

While this Court departed from the above-outlined rationale in *Takahashi* v. *Fish Comm'n.,* 334 U.S. 410 (1948), that holding was occasioned by the racial overtones of the questioned statute and the Court's uncertainty of state ownership of marginal sea fisheries. The statute of Virginia in question here is untainted by racial motives and the uncertainty as to state ownership and interest in marginal sea fisheries has been resolved conclusively in favor of the states by the Submerged Lands Act, 43 U.S.C. § 1301 *et seq.*

Whatever inroads may have been made to undermine the validity of the proprietary interest doctrine in other contexts, *Sugarman* v. *Dougall,* 413 U.S. 634 (1973), *In re Griffiths,* 413 U.S. 365 (1971), the doctrine has never been rejected in the context of state laws respecting conservation of valuable natural resources. *Truax* v. *Raich,* 239 U.S. 33 (1915). Moreover, if its rejection is appropriate in this context it would more clearly be so in respect to distinctions made which flatly discriminate against individual resident aliens as contrasted with those state classifications, like the present one, which are aimed at foreign-owned corporate entities, lacking the benefits of presumptions flowing from federal immigration and naturalization processes, which have prompted the Courts to view them on equal terms with United States citizens.

III.

Virginia Code Section 28.1-60 Which Restricts Menhaden Fishing In The Chesapeake Bay To Virginia Residents Is A Valid Exercise Of State Police Power To Conserve Fisheries Resources And Is Permissible Under The Fourteenth Amendment

Pursuant to Virginia Code § 28.1-60 Virginia's Chesapeake Bay menhaden fishery is open only to Virginia resident persons, firms and corporations. Placing reliance in *Takahashi* v. *Fish Comm'n.,* 334 U.S. 410 (1948), the lower court held the statute to be violative of the Equal Protection Clause of the Fourteenth Amendment. (App., p. 19). It is, at once, apparent that the District Court reliance upon *Takahashi* was improper. *Takahashi* involved a state measure which denied fishing licenses to persons "ineligible to citizenship," thereby establishing a classification based in *alienage* and *race.* 334 U.S. 412. This Court noted very pointedly that under circumstances of that type of classification the state had narrow limits in its discretion. 334 U.S. 412. But in the present case, the Virginia statute under scrutiny involves a *residency* classification for purposes of regulating an economic resource of the state. In these circumstances it is amply clear that traditional standards of equal protection are applicable, thereby allowing the state much broader latitude in its regulation. *Toomer* v. *Witsell,* 334 U.S. 385, 396 (1948). Under traditional principles of equal protection, therefore, a state law must be upheld if it can be justified upon any reasonable factual basis which may be conceived to underlie the law. *McGowan* v. *Maryland,* 366 U.S. 420 (1961). The close judicial scrutiny which may be appropriate where the classification is "suspect," *McLaughlin* v. *Florida,* 379 U.S. 184, 196 (1964), or where the operation of the classification denigrates basic constitutional rights, *Shapiro* v. *Thompson,*

394 U.S. 618 (1969), is not applicable to this statute. *San Antonio School District* v. *Rodriquez,* 411 U.S. 1, 40 (1973). The District Court, therefore, improperly applied more stringent standards in reviewing Virginia Code § 28.1-60 than the Equal Protection Clause demands.

Applying traditional equal protection standards, § 28.1-60 does have a reasonable basis justifying its exclusion of non-residents. The Chesapeake Bay menhaden fishery is the chief and most valuable Virginia fishery. But it is, likewise a fragile fishery. The Chesapeake Bay serves particularly well as a nursery for newly spawned menhaden who enter the Bay in early spring and remain there in protected waters for at least some ten or eleven months of their first year. (Dep. W. Jackson Davies, App., p. 74 and Dep. Robert B. Chapoton, App., p. 95). Young menhaden are fragile in that they are less migratory and less able, therefore, to escape non-conservationist fishing practices. Virginia, unlike many other states, regulates by statute net mesh size for taking of menhaden in an effort to nurture the valuable fishery and protect it from over-fishing of the young small fish. See Virginia Code § 28.1-65.

Enforcement of any conservation measure, particularly net mesh size regulations and similar measures, is not without practical problems. Vessel boardings by state inspectors while fishing activities are underway are disruptive to fishing procedures, costly to the state in that it requires increased numbers of enforcement vessels and inspectors, and are generally inefficient due to the relative mobility of fishing vessels, which enables them to avoid enforcement on the waters. Dockside inspection is clearly preferable and more efficient. Non-resident menhaden vessels, however, would enter the Bay, fish, and leave without docking in Virginia ports in the majority of cases. As a practical matter, then, net size enforcement, the vital link in this fishery's conservation, is virtually unenforceable as to non-resident fishing vessels.

Moreover, it is recognized by fisheries management experts that voluntary compliance is a key factor in any fisheries conservation approach. (Dep. James E. Douglas, Jr., App., p. 69) Non-residents are less likely to offer voluntary compliance with enforcement measures, lacking, as they naturally would, the self-interest in preservation which motivates residents, who must depend upon a renewable resource for their livelihood. These considerations, when taken into account, must certainly be viewed as rational justification for Virginia's restriction against non-residents in the Chesapeake Bay menhaden fishery. Under principles established by this Court in *McGowan* v. *Maryland,* 366 U.S. 420 (1961), *Dandridge* v. *Williams,* 397 U.S. 365 (1970), and *San Antonio School District* v. *Rodriquez,* 413 U.S. 1 (1973), the provisions of Virginia Code § 28.1-60 must be upheld against Seacoast's equal protection challenge.

Toomer v. *Witsell,* 334 U.S. 385 (1948), relied upon heavily by Seacoast, is not dispositive of this case. First, and foremost, the virtual exclusion of non-residents in *Toomer* was not justified on the grounds that non-residents represented the source of any particular evil or threat to conservation of fish. As this Court noted, 334 U.S. 385, 397, 398:

> "As justification for the statute, Appellees urge that the State's obvious purpose was to conserve shrimp supply, and they suggest that it was designed to head off an impending threat of excessive trawling. The record casts some doubt on these statements. But in any event, Appellees' argument assumes that any means adopted to attain valid objectives necessarily squares with the privileges and immunities clause. It overlooks the purpose of that clause, which, as indicated above,

> is to outlaw *classifications based on the fact of non-citizenship unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed."*

In *Toomer,* then, there is a clear indication that state residency requirements will be upheld where a peculiar evil can be attributed to non-residents. The unenforceability, against non-residents, of Virginia's hief conservation tool in the Chesapeake Bay menhaden fishery does offer reasonable justification for the exclusion of non-residents. It is, furthermore, noteworthy that in *Toomer,* South Carolina had no conservation laws other than the non-residency provision, while Virginia has demonstrated through legislation a conservation effort apart from its exclusion of non-residents.

Additional justification for upholding Virginia's Chesapeake Bay menhaden residency requirement is found in this Court's holding in *McCready* v. *Virginia,* 94 U.S. 391 (1877). There, the vital interests of the states in domestic fisheries resources was recognized as justifying exclusion of non-residents. As was the case in *McCready,* the fisheries resources requiring protection are located in the State's inland waters. This Court's decision in *Toomer* v. *Witsell,* 334 U.S. 385 (1948) does not overrule *McCready* nor does it now offer reason to reject the applicability of the *McCready* holding here. *Toomer* failed to follow *McCready* for two reasons: (1) the fisheries there involved were located in coastal waters in the marginal sea, the ownership of which were unsettled in 1948, and (2) the shrimp fishery of the coastal waters were highly migratory by nature, which factor the Court found cast doubt upon state ownership.

As noted previously, the Chesapeake Bay menhaden fishery is an inland water fishery, distinguishable immediately

from the coastal shrimp fishery in *Toomer.* There has never been any question that the states own the waters and beds of their inland waters. As to the migratory character of the fish involved, Chesapeake Bay menhaden are, because of their relative youth, far less mobile in ranging the coast than are menhaden in other parts of the United States. (Dep. Robert B. Chapoton, App., p. 110). In fact, in some portion of the Bay menhaden never leave the Bay during their first year, but instead, over-winter there. (Dep. Robert B. Chapoton, App., p. 101). In addition, it is an important fact that when Chesapeake Bay menhaden are subject to fishing effort (a season of some six months) they are a relatively stable localized resource. It is abundantly clear that the Chesapeake Bay menhaden industry fishing effort does not involve navigation up and down the coast pursuing highly migratory fish. Instead, menhaden are found in dense schools which remain within the Bay which affords protection from open seas necessary for nursery stocks and the younger fish. The life habits of Chesapeake menhaden, therefore, reveal that they are localized sufficiently to be viewed as the property of Virginia.

The factors which may have persuaded the Court to reject the important state interest recognized in *McCready* are, then, not present in this case.

It is also clear that since *Toomer* the Congress, by enactment of the Submerged Lands Act, 43 U.S.C. § 1301 *et seq.,* has conferred on the states title to *all* fisheries resources within their boundaries out to three miles, irrespective of whether such fish are migratory.

Whether *McCready* is alone viewed as offering satisfactory rationale for the defense of the Virginia statute under review here, the importance of the states' interests in their natural resources is highlighted by that decision. Virginia

has no less vital interest in the menhaden fishery of the Chesapeake Bay. Having recognized that interest and the fragile balance required to maintain that interest the demonstrated inability of the state to enforce necessary conservation measures against non-resident fishermen clearly constitutes lawful justification for the residency classification made by Virginia Code § 28.1-60. *McGowan* v. *Maryland,* 366 U.S. 420 (1961).

IV.

Neither Virginia Code Section 28.1-60 Nor Section 28.1-81.1 Interferes With Or Unduly Burdens Interstate Commerce

Virginia Code sections 28.1-60 and 28.1-81.1 are designed to regulate eligibility for licenses to take fish in Virginia's waters. Concerned only with the "taking of fish," these statutes do not attempt to regulate navigational activities of fishing vessels, nor do they restrict the movement of fish out of the State after they are taken.

This Court has consistently held that the "taking of fish" in state waters constitutes a purely "local activity" which is not a part of commerce among the states. *State of Alaska* v. *Arctic Maid,* 366 U.S. 199 (1961), *Toomer* v. *Witsell,* 334 U.S. 385 (1948). The taking of fish in state waters has, therefore, long been viewed as a matter appropriate for state police power regulation. *Manchester* v. *Massachusetts,* 139 U.S. 240 (1891), *McCready* v. *Virginia,* 94 U.S. 391 (1877).

Seacoast would have this Court apply the holdings in *H. P. Hood and Sons, Inc.,* v. *Du Mond,* 336 U.S. 525 (1949), *Baldwin* v. *Seelig,* 294 U.S. 511 (1935), and *Foster-Fountain Packing Co.* v. *Haydel,* 278 U.S. 1 (1928), to find the Virginia laws here in question violative of the limitations imposed by the commerce clause. It is at once

apparent that the holdings in those cases are not even remotely applicable to the laws involved here. As this Court noted in *H. P. Hood and Sons., Inc.,* v. *DuMond,* at 336 U.S. 525, 535:

> "This Court consistently has rebuffed attempts of states to advance their own commercial interests *by curtailing the movement of articles of commerce, either into or out of the state,* while generally supporting their right to impose even burdensome regulations in the interest of local health and safety."

It was the state restriction upon *movement of articles of commerce into or out of the state* which was found unconstitutional in *Foster-Fountain Packing Co.* v. *Haydel, H. P. Hood and Sons, Inc.* v. *DuMond,* and *Baldwin* v. *Seelig.* Virginia has not by its licensing statutes in any manner, directly or indirectly, attempted to impede the free flow of fish taken in Virginia out of the state.

In point here is this Court's holding in *Bayside Fish Flour Co.* v. *Gentry,* 297 U.S. 422 (1936) wherein it considered commerce clause objections to a California law regulating manufacture, canning and packing of sardines:

> "There is nothing in the state act to suggest a purpose to interfere with interstate commerce. It in no way limits or regulates or attempts to limit or regulate the movement of sardines from outside into the state, or the movement of the manufactured product from the state to the outside. The act regulates only the manufacture within the State. Its direct operation, intended and actual, is wholly local. 297 U.S. 422, 425, 426.

As this Court's holding in *Toomer* v. *Witsell,* 334 U.S. 385 (1948) made clear the commerce clause objection raises two essential inquiries: (1) is the activity regulated a part of interstate commerce; and (2) does the state's law unduly burden interstate commerce:

> "Nor does the statute violate the commerce clause. It does not discriminate against interstate commerce in shrimp, and the taxable event, the taking of shrimp, occurs before the shrimp can be said to have entered the flow of interstate commerce." 334 U.S. 385, 394, 395.

As in *Toomer,* here the regulated activity is the taking of fish, a local activity, and the regulation involved in no way discriminates against interstate commerce in fish or fish products.

The broad latitude states frequently require in effectively managing their natural resources has historically been recognized by this Court in turning back commerce clause objections to state legislation. *Silz* v. *Hesterberg,* 211 U.S. 31 (1908), *Geer* v. *Connecticut,* 161 U.S. 519 (1896). In certain instances it has been adjudged that states have so great an interest in preserving their resources as to allow state restrictions which directly impinge on the free flow of commerce. *Geer, supra.*

The Virginia licensing statutes directed at conservation of valuable fisheries, and free of any restriction upon any activity which can be legitimately called a part of commerce, must, therefore, be upheld as imposing no unconstitutional burden upon interstate commerce.

V.

The Lower Court Should Have Abstained From Interference In State Domestic Fisheries Management, Where The Questioned Statutes Infringe Upon No Sensitive Constitutional Guarantees And Interpretation Of The Statutes By State Courts Might Avoid Broad Constitutional Issues

The federal courts have customarily abstained from interference in the administration of state domestic programs, particularly where no basic constitutional guarantee is

jeopardized by enforcement of the state laws questioned. *Alabama Public Service Commission* v. *Southern Rwy. Co.,* 341 U.S. 341 (1951). *Burford* v. *Sun Oil Co.,* 319 U.S. 315 (1943), and *Great Lakes Dredge Co.* v. *Huffman,* 319 U.S. 293 (1943). Fisheries management has been recognized as a matter of local concern within the police powers of the states, requiring state legislation tailored to the needs of the particular fishery. *Toomer* v. *Witsell,* 334 U.S. 385 (1948), *Manchester* v. *Massachusetts,* 139 U.S. 240 (1891). This Court recognized the wisdom in abstaining from interference in state fisheries licensing controversies in *Reetz* v. *Bozanich,* 397 U.S. 82 (1970), noting that local fisheries are "a unique resource, the management of which is a matter of great state concern," and that state court interpretation of a state constitutional provision might "conceivably avoid" the federal constitutional issues involved.

Seacoast, denied licenses under provisions of Virginia Code § 28.1-81.1, because it is a foreign-controlled corporate entity, has broadly challenged the aforementioned statute as an alienage classification, deserving strict judicial scrutiny, under authority of recent decisions of this Court.[4]

Should the Court, however, view the present controversy as raising a broader constitutional issue, namely, the possible unconstitutionality of restrictions on the rights of individuals by § 28.1-81.1, the case should be remanded on this point to allow an authoritative construction of the applicable statute by the Supreme Court of Virginia. For it is clear that such an interpretation by the Virginia Court could eliminate the broad constitutional issue regarding individual resident aliens. The Virginia Court would be required to

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[4] *Sugarman* v. *Dougall,* 413 U.S. 634 (1973), *In re Griffiths,* 413 U.S. 717 (1973), *Graham* v. *Richardson,* 403 U.S. 365 (1971), holding that alienage classifications applied to *individual resident aliens* require close judicial scrutiny.

examine the statutory language in light of this Court's recent decisions tending to place individual resident aliens on equal footing, substantially, with United States citizens. *Sugarman* v. *Dougall,* 413 U.S. 634 (1973). Thus, as related to individuals, the Virginia Court might reasonably view the statute as denying licenses to only non-resident individual aliens. Such an interpretation would render individual resident aliens eligible for licenses as United States citizens, thereby avoiding the constitutional question raised here by Seacoast. That such an interpretation by the Virginia Court is "conceivable" is undeniable. *Reetz* v. *Bozanich,* 397 U.S. 82 (1970). Further, in light of the overriding purpose of the statute, to reach foreign-owned corporations, and this Court's protection of resident aliens, such an interpretation is not at all unlikely. Abstention in these circumstances is proper. *Railroad Comm'n.* v. *Pullman,* 312 U.S. 396 (1941).

In view of the unique local problems associated with fisheries management, a traditionally local matter, the absence of infringement of sensitive constitutional guarantees, and the possibility of avoiding broad constitutional issues through state court review, the lower court should have exercised its judicial discretion to abstain from deciding this case.

CONCLUSION

Neither the Bartlett Act, 16 U.S.C. § 1081 *et seq.,* nor the federal vessel enrollment and licensing statutes preempt the power of the respective states to regulate and license commercial fisheries in their inland waters or their three-mile marginal seas.

Neither Virginia Code § 28.1-81.1, preventing issuance of commercial fishing licenses to foreign-owned corporations, nor Virginia Code § 28.1-60, restricting menhaden fishing in the Chesapeake Bay to Virginia residents, violates the Equal Protection Clause of the Fourteenth Amendment.

Neither Virginia Code § 28.1-81.1 nor Virginia Code § 28.1-60 interferes with or unduly burdens interstate commerce in violation of Article I, § 8 of the United States Constitution.

The District Court should have abstained from interference in state administration of domestic fisheries regulations where such state regulation does not impinge upon any sensitive constitutional right and where state court interpretation might void broad constitutional issues.

For the foregoing reasons the judgment of the United States District Court for the Eastern District of Virginia should be reversed.

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CERTIFICATE OF SERVICE

I, Anthony F. Troy, Deputy Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States and one counsel for James E. Douglas, Jr., in the above-captioned matter, hereby certify that three (3) copies of this Brief have been served upon each counsel of record for the parties herein by depositing the same in the United States Post Office with first class postage prepaid, this 30th day of June, 1976, as follows:

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